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Before the
Federal Communications Commission
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Application by New York Telephone Company)
(d/b/a Bell Atlantic - New York),)
Bell Atlantic Communications, Inc.,)
NYNEX Long Distance Company)
and Bell Atlantic Global Networks, Inc.,)
For Authorization to Provide In-Region,)
InterLATA Services in New York Pursuant)
to Section 271 of the Telecommunications)
Act of 1996)

CC Docket No. 99-295

REPLY COMMENTS OF
LEVEL 3 COMMUNICATIONS, LLC

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Dated: November 5, 1999

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TABLE OF CONTENTS

| | <u>Page</u> |
|--|--------------------|
| Summary | ii |
| I. Introduction | 1 |
| II. Reply Comments | 1 |
| A. Bell Atlantic-New York enjoys an unfair advantage over other telecommunications providers through exemption from municipal franchise requirements | 1 |
| B. If the FCC approves Bell Atlantic - New York's interLATA authority, such approval should be conditioned on final approval of a non-discriminatory scheme of municipal franchises throughout New York State | 3 |
| III. Conclusion | 4 |

SUMMARY

Level 3 Communications, LLC ("Level 3") submits these Reply Comments to address the ongoing issue of discrimination in municipal franchising within New York State, the unfairness of which New York Telephone Company ("Bell Atlantic - New York") is a beneficiary. This issue was initially raised in this proceeding by the City of New York ("The City"). The City filed Comments describing a discriminatory regime in The City whereby Bell Atlantic - New York avoids paying the substantial franchise fees imposed upon its competitors. As long as charges for use of the municipal rights-of-way continue to be unequal between competitors, a "level playing field" will not exist in New York. Moreover, by permitting Bell Atlantic - New York's long distance affiliates to initiate interLATA service in New York State, the FCC will be permitting new beneficiaries of the unequal regime.

If Bell Atlantic - New York is allowed to commence interLATA services in New York, approval of that authority and approval of joint marketing with its affiliates should be conditioned on Bell Atlantic - New York first obtaining franchises on terms and conditions that are comparable to those of its competitors.

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**REPLY COMMENTS OF
LEVEL 3 COMMUNICATIONS, LLC**

I. INTRODUCTION

Pursuant to Part 1, Subpart C of the Commission's rules, 47 CFR §§ 1.401 - 1.430, Level 3 Communications, LLC ("Level 3") respectfully submits these Reply Comments in the above-captioned proceeding. Level 3 addresses its Reply Comments to the issue of discrimination in municipal franchising within New York State, as discussed in Comments of the City of New York, submitted in this proceeding ("City Comments").

II. REPLY COMMENTS

A. Bell Atlantic-New York enjoys an unfair advantage over other telecommunications providers through exemption from municipal franchise requirements.

The Federal Telecommunications Act ("FTA") requires that all telecommunications providers be allowed to compete on a "level playing field." In New York State, an unfair system of municipal franchising, tolerated by State and local officials, does not fulfill that mandate. The City Comments

point to an ongoing issue of discrimination that prevents achievement of a level playing field between Bell Atlantic - New York and its competitors. Level 3 and other competitors continue to be required to pay municipal franchise fees in the City of New York and elsewhere within New York State while Bell Atlantic is exempted. Level 3 supports the City's view that Bell Atlantic - New York should obtain a franchise, but wishes to expand on that argument and also correct some misimpressions that may result from the City Comments.

While the City of New York asserts in its Comments that its "standard" franchise compensation rate is 5% of gross revenues, this understates the burden of the municipal fees and other imposed obligations. In addition to a 5% fee, Level 3 has been required to contribute substantial in-kind services and facilities to the City at no charge, as a condition of receiving a franchise. The percentage-of-revenue fee and the accompanying in-kind contributions combine to impose upon Level 3 a significant cost for use of municipal rights-of-way. According to available information, confirmed by the City in its Comments, Bell Atlantic pays no equivalent charges.

Bell Atlantic - New York's franchise, granted by the State of New York to New York Telephone Company in the last century, purportedly relieves it of any obligation for costly terms and conditions imposed on its competitors for use of public streets.^{1/} In fact, there is no evidence that Bell Atlantic-New York's exemption has been subjected to even the most superficial challenge by State or local officials. Certainly, Bell Atlantic - New York has not been forced to defend its New

^{1/} In fact, the City does not state how it has come to know the arguments against requiring Bell Atlantic-New York to obtain a franchise, although it must be assumed that these arguments have been advanced by Bell Atlantic.

York exemption in any proceeding subsequent to the FTA.^{2/} So, perhaps it should not be surprising that, even as the City argues in its Comments that Bell Atlantic - New York should be required to obtain a municipal franchise as a condition of receiving interLATA authority, the City then takes the curious step of making counter-arguments on Bell Atlantic - New York's behalf. In particular, the City has advanced the questionable premise that Bell Atlantic - New York operates in a "very different manner" than its recent competitors, and appends that argument to the ludicrous idea that Bell Atlantic-New York's near-monopoly status in the City somehow justifies municipal right-of-way discrimination against competitors.^{3/} Many of these arguments, if advanced by Bell Atlantic, would be subject to serious challenge and rebuttal.

Charges for InterLATA services are made up largely of access charges, and Bell Atlantic - New York enjoys a cost advantage of more than 5% in the provision of local access services in New York City and much of the rest of New York State, due to its exemption from municipal franchise fees. To allow that cost advantage to continue while permitting Bell Atlantic - New York to jointly market interLATA and local service within New York State would simply extend that unfair regime to Bell Atlantic affiliates. The negative competitive impact would then apply to both interexchange carriers and local competitors.

B. If the FCC approves Bell Atlantic - New York's interLATA authority, such approval should be conditioned on final approval of a non-discriminatory scheme of municipal franchises throughout New York State.

^{2/} The most recent case known to have considered Bell Atlantic - New York's exemption from municipal franchise requirements is *City of New York v. Comtel, Inc.*, 57 Misc. 2d 585, 613, 293 N.Y.S.2d 599, 625 (Sup. Ct. 1968), a case in which Bell Atlantic - New York was not even a party.

^{3/} New York City Comments at 3.

Section 271(d)(3)(C) allows the Commission to incorporate other provisions of the Communications Act of 1934 into its consideration of Bell Atlantic - New York's application for interLATA authority. Section 271(d)(3)(C) states that the Commission will not approve Bell Atlantic - New York's interLATA service authority unless it finds that "the requested authorization is consistent with the public interest, convenience, and necessity."^{4/} Therefore, among the considerations that the Commission should address in determining whether Bell Atlantic - New York has met requirements of 271 is whether Bell Atlantic - New York is the beneficiary of discriminatory municipal franchise fees. Section 253(c) requires that public rights-of-way be available to telecommunications providers on a "competitively neutral and non-discriminatory" basis.^{5/}

III. CONCLUSION

It has now been almost four years since enactment of the Telecommunications Act of 1996, at which time Congress required that compensation paid by telecommunications service providers for use of public rights-of-way be competitively neutral and non-discriminatory.^{6/} In the time that has elapsed, several cities and States have enacted municipal franchise regimes that fulfill that mandate. New York is an unfortunate exception, perhaps due to antiquated laws and "grandfathered rights" discussed in the New York City Comments.^{7/} Whatever the reason for this enduring inequity, it is now time to provide Bell Atlantic-New York with the incentive to support a negotiated

^{4/} 47 U.S.C. § 271.

^{5/} *Id.* at § 253(c).

^{6/} *Id.*

^{7/} New York City Comments at 2.

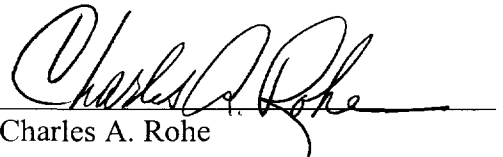
or legislative solution. If Bell Atlantic - New York is allowed to commence interLATA services in New York, then approval of that service and joint marketing of that service by Bell Atlantic - New York and its affiliates, should be conditioned on Bell Atlantic-New York first obtaining municipal franchises on terms and conditions that are comparable to those of its competitors.

Respectfully submitted,

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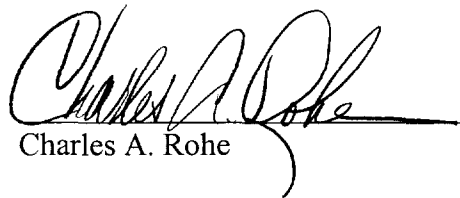
CERTIFICATE OF SERVICE

I, Charles A. Rohe, hereby certify that I have on this 5th day of November, 1999, served copies of the foregoing Reply Comments of Level 3 Communications, LLC on the following via hand delivery:

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